MGG PILLAI

v.

TAN SRI DATO' VINCENT TAN CHEE YIOUN

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
HAIDAR MOHD NOOR FCJ
[CIVIL APPEAL NO: 02-5-95(W)]
16 MAY 2002

CIVIL PROCEDURE: *Judgment - Reserved judgment - Federal Court - Delivery of judgment after one of three judges in quorum retired - Whether judgment rendered invalid as prior consent of parties was not obtained - Section 78(1) Courts of Judicature Act 1964 - Whether retirement of judge fell within "any other cause" under s. 78(1) - Whether requirement that parties consent before delivery of judgment is removed by amendment to s. 78(1) - Whether amended s. 78(1) has a retrospective effect - Whether rights acquired before amendment could not be removed - Interpretation Acts 1948 & 1967, s. 30(1)(b) - Federal Court Rules 1995, r. 137*

CIVIL PROCEDURE: *Amendment - Pleadings - Application to correct civil appeal number - Whether amendment amounted to misconduct on part of applicant - Whether amendment sought only to correct a defect in pleadings - Whether applicant fulfilled criteria for amendment - Whether allegations of misconduct unfounded - Whether application to amend should be allowed*

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Whether Federal Court has an inherent jurisdiction to set aside its previous judgment - Chia Yan Tek & Anor v. Ng Swee Kiat & Anor - Federal Court Rules 1995, r. 137*

There were three motions before this court. The first motion was the applicant's application to set aside an order of this court dated 12 July 2000 ('the judgment') against him on the grounds that the judgment was invalid as it was delivered by an improperly constituted court, the reason being, that one of the presiding three judges had retired before the judgment was delivered; and that the judgment was tainted with apparent bias on the part of the presiding judge. The second motion was the respondent's application to set aside the applicant's application above based on some irregularities in the documents therein whilst the third motion was the applicant's application to amend the said irregularities on those documents.

The issues for determination, *inter alia*, were: (1) whether the retirement of the judge concerned fell within s. 78(1) of the Courts of Judicature Act 1964 ('CJA'); (2) whether the requirement of prior consent of the parties was removed by the amendment to s. 78(1); and (3) whether the amendment was retrospective.

Held:

Per Steve Shim CJ Sabah & Sarawak (dissenting)

[1] The Federal Court has the inherent jurisdiction and power which can be invoked in limited circumstances to re-open, re-hear and re-examine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. (p 590 a-b)

[2] The words in s. 78(1) CJA are clear enough. The term "any other cause" must necessarily cover a situation where a judge has retired. (p 592 f)

[3] By virtue of the Courts of Judicature (Amendment) Act 1998, the words "if parties consent" in the old s. 78 CJA were deleted as was the entire subsection (3) thereof. The amended s. 78 CJA had removed a substantive right of the applicant and therefore had no retrospective effect. A proper construction of s. 78 would be that the need for consent of the parties was confined to the continued hearing as opposed to the concluded hearing of a proceeding before the remaining panel of judges. From the facts, it was clear that the actual hearing of the appeal had concluded pending reserved judgment before the retirement of the judge concerned. As such, no consent was needed to be sought. (pp 593 d-f & 594 g)

[4] Section 78 CJA is a contingency provision which provides for a contingency to wit, inability of a judge, through illness or any other cause, to attend proceedings, or otherwise exercise his judicial functions. The term "any other cause" must necessarily cover a situation where a judge has retired. The contingency herein occurred when the judge concerned retired. At that time, the new s. 78 applied. The right to consent under the old s. 78 did not apply. The amended s. 78(1) specifically provides that the reserved judgment shall be given by the remaining judges not being less than two. The reserved judgment herein was delivered when both of the remaining judges were still in office. For the reasons stated, the Federal Court was properly constituted at the time the reserved judgment was delivered. The judgment was therefore not vitiated. (p 595 a-e)

[5] The doctrine of waiver militated firmly against the applicant by his delay of some 37 months to challenge the judgment from the date it was reserved by the court. (pp 595 g & 598 b)

Per Siti Norma Yaakob FCJ (majority)

[1] The application to amend sought to correct an erroneous civil appeal number appearing in three documents. The proposed amendments go no further than that. As such, the allegations of misconduct on the part of the applicant that he had delayed in seeking to amend, tampered and altered the civil suit number in his pleadings and possessed bad faith in making the application seemed out of context and appeared to be misplaced. This was more so when the proposed amendments seek no more than to correct a defect in the pleadings. Provided that: such amendments do not change the character of the dispute into another and inconsistent character; are made bona fide on the part of the applicant; and cause no prejudice to the respondent which cannot be compensated in costs, they are normally always allowed in law. Since the application to amend in these proceedings fulfilled the said three criteria, the application to amend was allowed with costs to the respondent. (p 600 b-f)

[2] Rule 137 of the Federal Court Rules 1995 gives this court the inherent jurisdiction to set aside its own judgment *(Chia Yan Tek & Anor v. Ng Swee Kiat & Anor)*. That being so, this court must determine whether any injustice had been done to the applicant or whether an abuse of process of court had been committed as to warrant the success or otherwise of the principal application. (p 602 c-f)

[3] The retiring judge might have well indicated his approval to the judgment but his decision was only known to his brother judges. Under such circumstances, a more appropriate approach was to ascertain when the judgment became effective for it was the effective date that one looked at to consider the adequacy in the composition of the court. The effective date of a judgment has now been settled in the case of *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* to be the date of its pronouncement in open court and not any other earlier acts aimed at arriving at a decision. (p 603 a-d)

[4] There were only two judges remaining on 12 July 2000 who were capable of functioning as judges of that court, the third having been retired before that date. If there had to be any saving, it could only be done under s. 78 CJA. (p 603 e)

[5] The relevant provisions of s. 78 CJA both in its original and amended forms, specifying the reasons for the absence of a judge are wide enough to include a judge who has retired, died or dismissed. This is clear from the words "any other cause" appearing in the phrase "unable through illness or any other cause to attend the hearing or otherwise exercise his function of a judge of the court." Those words admit to the interpretation that the other reasons why the absent judge cannot function may well be due to his retirement, death or dismissal. (p 604 d)

[6] Whilst s. 78 CJA both in its original and amended form regulate the procedure to be followed when a judge is absent, the pre-amendment requirement that the parties give their consent to the remaining two judges to proceed with the hearing and pronounce a judgment is a substantive right. The parties are vested with the right to control proceedings of a hearing for without their consent, the applicant's appeal has to be ventilated afresh before another panel of the court. The applicant's entitlement to control the proceedings constituted an interest that accrued at the commencement of his appeal which was protected by s. 30(1)(b) of the Interpretation Acts 1948 and 1967. That section states that the repeal of a written law in whole or in part shall not affect any right, accrued or incurred under the repealed law. Since the applicant's accrued interest had been violated leading to miscarriage of justice, it followed that he was entitled to have his appeal re-heard before another panel of this court. (p 605 c-g)

[7] The issue of bias merited no consideration in the applications before this court. (p 605 h)

Per Haidar Mohd Noor FCJ (majority)

[1] Under the original provision of s. 78 CJA, the consent of the parties was required as the judge concerned retired by the time the reserved judgment was pronounced on 12 July 2000, *ie*, the effective date of the judgment. The words, "any other cause" in s. 78 CJA were clear enough to cover a situation where a judge had retired. Further, the reserved judgment was unanimously given by the remaining judges but the key issue was whether the consent of the parties was removed by the amendment to s. 78(1) CJA and whether the amendment was retrospective. (p 610 f-g)

[2] At the time the appeal was filed by the applicant and when it was heard and judgment was reserved, the amendment to s. 78 CJA had not been made yet. In construing whether the amendment to s. 78 CJA is retrospective, the relevant legislation for consideration is s. 30(1)(b) of the Interpretation Acts 1948 and 1967 which reads that the repeal of a written law in whole or in part shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law. As the consent of the parties is a substantive right, it follows that any law removing that right will not be retrospective unless the contrary is expressed therein. Further, the Courts of Judicature (Amendment) Act 1998 did not expressly state that the amendment is retrospective nor even by necessary intendment. It followed therefore that the failure of the remaining judges to get the consent of the applicant before delivering the reserved judgment had occasioned an injustice to the applicant. The judgment was invalid and by virtue of the original s. 78(1) read with

s. 78(3) CJA, the appeal should be re-heard before another panel of the court. In addition thereto, if any injustice is caused to a party, this court can resort to its inherent powers under r. 137 of the Rules of the Federal Court 1995. (pp 609 f, 611 f-g, 612 c, 613 h-i, 614 a-b)

[First motion allowed by a majority; second motion dismissed on insufficient merit; third motion allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Terdapat tiga usul di hadapan mahkamah ini. Pertama, permohonan pemohon untuk mengetepikan perintah mahkamah bertarikh 12 Julai 2000 ('penghakiman tersebut') terhadapnya atas alasan bahawa penghakiman tersebut tidak sah kerana ia diberikan oleh mahkamah yang tidak dibentuk dengan sempurna, alasannya kerana salah seorang dari tiga hakim yang bersidang telah bersara sebelum penghakiman tersebut diberikan, dan penghakiman tersebut dicemari dengan sifat berat sebelah yang jelas di pihak hakim yang bersidang. Usul kedua adalah permohonan responden untuk mengetepikan permohonan pemohon tersebut berdasarkan kepada beberapa ketidakpatuhan di dalam dokumen-dokumen di situ manakala usul ketiga adalah permohonan pemohon untuk meminda ketidakpatuhan dokumen-dokumen tersebut.

Isu-isu untuk diputuskan, *inter alia*, adalah: (1) sama ada persaraan hakim berkenaan jatuh di bawah s. 78(1) Akta Mahkamah Kehakiman 1964 ('AMK'); (2) sama ada kehendak kebenaran terdahulu pihak-pihak telah diketepikan oleh pindaan kepada s. 78(1); dan (3) sama ada pindaan tersebut berkuatkuasa kebelakangan.

Diputuskan:
Oleh Steve Shim HB (Sabah & Sarawak) (menentang)

[1] Mahkamah Persekutuan mempunyai bidangkuasa sedia ada dan kuasa yang boleh digunakan di dalam keadaan yang terhad untuk membuka semula, mendengar semula dan memeriksa semula penghakiman yang terdahulu, keputusan atau perintah yang telah diperolehi secara fraud atau penekanan keterangan yang material untuk menghalang ketidakadilan atau penyalahgunaan proses mahkamah.

[2] Perkataan di dalam s. 78(1) AMK adalah amat jelas. Terma "any other cause" semestinya termasuk keadaan di mana seseorang hakim telah bersara.

[3] Selaras dengan Akta Mahkamah Kehakiman (Pindaan) 1998, perkataan "if parties consent" di dalam s. 78 AMK yang lama telah dipotong begitu juga dengan keseluruhan sub-s. (3) di situ. Seksyen 78 AMK yang telah dipinda telah mengetepikan hak substantif pemohon dan oleh itu tiada

kesan retrospektif. Tafsiran yang betul kepada s. 78 adalah bahawa keperluan kebenaran pihak-pihak adalah terhad kepada sambungan pembicaraan bertentangan dengan pembicaraan yang telah diputuskan bagi sesuatu prosiding di hadapan panel hakim yang selebihnya. Daripada fakta-fakta, adalah jelas bahawa rayuan tersebut telah diputuskan sementara menunggu penghakiman rizab sebelum persaraan hakim berkenaan. Oleh itu, tiada kebenaran perlu dipohon.

[4] Seksyen 78 AMK adalah suatu peruntukan kontigensi yang memperuntukkan kontigensi ketidakupayaan seseorang hakim, melalui penyakit atau apa-apa sebab lain, untuk menghadiri prosiding, atau menjalankan fungsi kehakimannya. Terma "any other cause" semestinya bermaksud untuk merangkumi keadaan di mana seseorang hakim bersara. Kontigensi di sini berlaku apabila hakim berkenaan bersara. Pada masa itu, s. 78 yang baru terpakai. Hak untuk kebenaran di bawah s. 78 yang lama tidak terpakai. Seksyen 78 terpinda secara khusus memperuntukkan bahawa penghakiman rizab akan disampaikan oleh hakim-hakim yang tinggal tidak kurang dari dua orang. Penghakiman rizab di sini telah disampaikan semasa kedua-dua hakim tersebut masih bertugas. Atas sebab-sebab yang dinyatakan, Mahkamah Persekutuan telah dibentuk dengan sempurna pada masa penghakiman rizab itu disampaikan. Penghakiman tersebut dengan itu betul.

[5] Doktrin penepian amat bertentangan terhadap pemohon oleh kerana kelewatan selama 37 bulan untuk mencabar penghakiman tersebut dari tarikh ia dirizab oleh mahkamah.

Oleh Siti Norma Yaakob HMP (majoriti)

[1] Permohonan untuk meminda adalah untuk membetulkan kesilapan nombor rayuan sivil di dalam tiga dokumen. Pindaan yang dicadangkan tidak lebih dari itu. Oleh itu, dakwaan salah laku di pihak pemohon bahawa dia telah lewat di dalam membuat permohonan untuk meminda, mengusik, dan mengubah nombor tindakan sivil di dalam plidingnya dan mempunyai niat jahat di dalam membuat permohonan itu, merupakan luar konteks dan nampaknya tersilap terutamanya apabila cadangan pindaan yang dipohon tidak lebih dari untuk membetulkan kecacatan di dalam pliding. Selagi pindaan-pindaan semacam itu tidak mengubah sifat pertikaian itu kepada sifat yang lain dan yang tidak konsisten; pindaan tersebut dibuat secara *bona fide*; dan tidak memprejudiskan responden yang tidak boleh dipampaskan dengan kos, pindaan-pindaan tersebut selalunya dibenarkan di dalam undang-undang. Oleh kerana permohonan untuk meminda di dalam prosiding ini telah memenuhi ketiga-tiga kriteria tersebut, maka ia dibenarkan dengan kos kepada responden.

[2] Kaedah 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 memberi bidangkuasa sedia ada kepada mahkamah ini untuk mengetepikan penghakimannya sendiri *(Chia Yan Teck & Anor lwn. Ng Swee Kiat & Anor)*. Oleh itu, mahkamah ini mesti memutuskan sama ada apa-apa ketidakadilan telah dilakukan kepada pemohon atau sama ada penyalahgunaan proses mahkamah telah dilakukan untuk memastikan kejayaan atau selainnya permohonan prinsipal.

[3] Hakim yang bersara mungkin telah memberitahu persetujuannya kepada penghakiman tersebut tetapi keputusannya hanya diketahui oleh hakim-hakim panel tersebut. Di bawah keadaan ini, pendekatan yang lebih sesuai adalah untuk memastikan bila penghakiman itu menjadi efektif kerana tarikh efektif itulah yang diambilkira bagi kecukupan komposisi mahkamah. Tarikh efektif sesuatu penghakiman telah ditetapkan di dalam kes *Chia Yan Teck & Saw Yang Lain lwn. Ng Swee Kiat & Satu Yang Lain* sebagai tarikh pengumumannya di mahkamah terbuka dan bukannya kepada apa-apa tindakan sebelumnya.

[4] Terdapat hanya dua hakim yang tinggal pada 12 Julai 2000 yang berkeupayaan untuk bertugas sebagai hakim mahkamah tersebut, di mana yang ketiga telah bersara sebelum tarikh itu. Sekiranya ada apa-apa yang ingin diselamatkan, ianya hanya boleh dibuat di bawah s. 78 AMK.

[5] Peruntukan s. 78 AMK yang relevan di dalam kedua-dua bentuk asal dan terpinda, yang menyatakan sebab-sebab untuk ketidakhadiran seseorang hakim adalah cukup luas untuk merangkumi hakim yang telah bersara, mati atau dibuang. Ini adalah jelas dari perkataan "any other cause" yang terdapat di dalam frasa "unable through illness or any other cause to attend the hearing or otherwise exercise his function of a judge of the court." Perkataan-perkataan ini mentafsirkan sebab-sebab lain mengapa hakim yang tidak hadir tidak boleh bertugas mungkin disebabkan oleh persaraan, kematian atau pemberhentiannya.

[6] Manakala s. 78 AMK di dalam bentuk asal dan terpindanya mengawalsedia prosedur untuk diikuti apabila hakim tidak hadir, kehendak sebelum pindaannya, bahawa pihak-pihak memberi kebenaran kepada dua hakim yang tinggal untuk meneruskan dengan perbicaraan dan mengumumkan penghakiman merupakan hak substantif. Pihak-pihak diberi hak untuk mengawal prosiding sesuatu perbicaraan kerana tanpa kebenaran mereka, rayuan pemohon mesti didengar semula di hadapan panel lain mahkamah. Hak pemohon untuk mengawal prosiding adalah kepentingan yang terakru pada permulaan rayuannya yang dilindungi oleh s. 30(1)(b) Akta Tafsiran 1948 dan 1967. Seksyen tersebut menyatakan bahawa pemansuhan sesuatu

undang-undang bertulis secara keseluruhan atau sebahagian tidak akan mempengaruhi apa-apa hak, terakru atau ditanggung di bawah undang-undang yang dimansuhkan itu. Oleh kerana hak terakru pemohon telah dicabuli yang membawa kepada salah laksana keadilan, seterusnya dia berhak untuk rayuannya didengar semula di hadapan panel lain mahkamah ini.

[7] Isu sifat berat sebelah tidak mempunyai merit di dalam permohonan di hadapan mahkamah ini.

Oleh Haidar Mohd Noor HMP (majoriti)

[1] Di bawah peruntukan asal s. 78 AMK, kebenaran pihak-pihak diperlukan kerana hakim berkenaan telah bersara semasa penghakiman rizab diumumkan pada 12 Julai 2000, iaitu tarikh efektif penghakiman tersebut. Perkataan "any other cause" di dalam s. 78 AMK adalah cukup jelas untuk merangkumi keadaan di mana seseorang hakim telah bersara. Seterusnya, penghakiman rizab diberi dengan kesepakatan hakim-hakim yang tinggal tetapi isu utama adalah sama ada kebenaran pihak-pihak telah diketepikan dengan pindaan s. 78(1) AMK dan sama ada pindaan itu kebelakangan.

[2] Pada masa rayuan tersebut difailkan oleh pemohon dan apabila ia didengar dan penghakiman dirizab, pindaan kepada s. 78 AMK belum dibuat. Di dalam mentafsirkan sama ada pindaan kepada s. 78 AMK adalah kebelakangan, perundangan yang relevan untuk diambilkira adalah s. 30(1)(b) Akta Tafsiran 1948 dan 1967 yang menyebut bahawa pemansuhan sesuatu undang-undang bertulis secara keseluruhan atau sebahagian tidak akan mempengaruhi apa-apa hak, perlindungan, obligasi atau tanggungan yang diperolehi, terakru atau ditanggung di bawah undang-undang yang dimansuhkan itu. Oleh kerana kebenaran pihak-pihak adalah hak substantif, apa-apa undang-undang yang menghapuskan hak tersebut tidak akan beroperasi kebelakangan kecuali ianya ternyata. Seterusnya, Akta Mahkamah Kehakiman (Pindaan) 1998 tidak menyebut secara nyata bahawa pindaan itu kebelakangan ataupun bermaksud sedemikian. Berikutan dengan itu, kegagalan hakim-hakim yang tinggal untuk mendapat kebenaran pemohon sebelum menyampaikan penghakiman rizab telah menyebabkan ketidakadilan kepada pemohon. Penghakiman itu adalah tidak sah dan selaras dengan s. 78(1) yang asal dibaca bersama s. 78(3) AMK, rayuan tersebut perlu didengar semula di hadapan panel lain mahkamah ini. Tambahan pula, bagi apa-apa ketidakadilan yang dilakukan kepada sesuatu pihak, mahkamah ini boleh bergantung kepada kuasa sedia adanya di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995.

[Usul pertama dibenarkan dengan majoriti; usul kedua ditolak atas sebab kekurangan merit; usul ketiga dibenarkan.]

Case(s) referred to:

Auckland Casino Ltd v. Casino Central Authority [1995] 1 NZLR 142 ***(refd)***
Badiaddin v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***
Boswell & Coak (No 2) Law Times Reports [1902] vol lxxxxvi p 365 ***(refd)***
Bright & Co v. Sellar [1904] 1 KB 6 ***(refd)***
Capital Insurance Bhd v. Aishah Abdul Manap & Anor [2000] 4 CLJ 1 ***(refd)***
Chia Yan Teck & Anor v. Ng Swee Keat & Anor [2001] 4 CLJ 61 ***(refd)***
Colonial Sugar Refining Co Ltd v. Irving [1905] AC 369 ***(refd)***
Duke v. Reliance Systems Ltd [1987] 2 WLR 1225 ***(refd)***
Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 144 ***(refd)***
Locabail (UK) Ltd v. Beyfield Properties Ltd & Other Appeals [2000] 1 All ER 65 ***(refd)***
Looi Guan Kway v. Low Lean Bok & Ors [1938] 7 MLJ FMSR 35 ***(refd)***
Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors [1985] 2 CLJ 423; [1986] CLJ (Rep) 196 ***(refd)***
PP v. Sihabduin & Anor [1981] CLJ 39; [1981] CLJ (Rep) 82 ***(refd)***
Re Barrel Enterprises [1972] 3 All ER 631 ***(refd)***
Re Scott & Alvarez Contracts [1895] 1 Ch 596 ***(refd)***
Surendra Singh v. State of Uttar Pradesh [1954] 41 AIR (SC) 194 ***(refd)***
Tai Choi Yu v. The Chief Registrar of The Federal Court [1998] 2 CLJ 358 ***(refd)***
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 ***(refd)***
Yew Bon Tew v. Kenderaan Bas Mara [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 ***(refd)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a)
Courts of Judicature Act 1964, ss. 69(4), 74(1), 78, 96
Courts of Judicature (Amendment) Act 1998, s. 6
Federal Constitution, arts. 121(2)(c), 128
Federal Court Rules 1995, r. 137
Interpretation Acts 1948 and 1967, s. 30(1)(b)
Rules of the High Court 1980, O. 92 r. 4

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol 37, para 14

For the applicant/appellant - M Sivalingam (M Sivalingam, Bastian Pius Vandergon, Vinayak Pradhan, Ramesh Kanapathy, Mark Ho, Kamraj Nayagam); M/s Chellam Wong Advoc

For the respondent - VK Lingam (Adam Bachek, R Thayalan); M/s Adam Bachek & Assoc

[Appeal from Court of Appeal, Civil Appeal No: W-02-21-1994]

Reported by Usha Thiagarajah

JUDGMENT

Steve Shim CJ (Sabah & Sarawak):

The Issues

There are three motions before us. The first motion dated 23 February 2001 was filed by the applicant seeking to set aside the judgment of the Federal Court dated 12 July 2000. The second motion dated 30 March 2001 was filed by the respondent seeking to strike out the applicant's first motion on grounds of irregularities. The third motion dated 4 April 2001 was filed by the applicant seeking to amend the first motion. Because of the nature of the motions filed by the parties concerned, we felt it appropriate to deal with the second motion first. After hearing arguments, we dismissed the second motion for insufficient merit.

Given the conclusion we take on the second motion, and for the reasons succinctly stated by our learned sister Siti Norma Yaakob HMP, we find no difficulty in granting the third motion filed by the applicant but with cost to the respondent. This of course leaves us with the main motion filed by the applicant, which, as I have said, seeks to set aside the judgment of the Federal Court dated 12 July 2000. Essentially, two grounds have been advanced namely:

(1) that the judgment was invalid as it was delivered by an improperly constituted court; and

(2) that the said judgment was tainted by an apparent bias on the part of the presiding judge.

The Background

It is appropriate to state briefly the factual background involved. The applicant was sued by the respondent *vide* Civil Suit No. S5-23-23-1994 concerning an article written by the applicant for a monthly magazine. On 22 October 1994, the High Court found against the applicant. The applicant appealed to the Court of Appeal but the appeal was dismissed on 18 April 1995. On 17 July 1995, the Federal Court granted the applicant leave to appeal against the decision of the Court of Appeal. On 12 & 13 January 1998, the Federal Court, comprising of Eusoff Chin, KHN; Wan Adnan, HBM; and Chong Siew Fai, HBSS, heard the appeal. Judgment was reserved to a date to be fixed. It may be noted that the respondent was at all material times represented by Dato' V.K. Lingam including the appeal before the Federal Court. By a letter dated 6 July 2000 from the deputy registrar of the Federal Court, the parties were informed that the decision of the Federal Court would be announced on 12 July 2000 at 9am. On 12 July 2000, the decision was read out by the senior assistant registrar. There was only one judgment of the court and it was written by Eusoff Chin, KHN the presiding judge.

Jurisdiction

At the outset, counsel for respondent has raised a jurisdictional issue. He contends that pursuant to art. 128 of the Federal Constitution (hereafter 'the Constitution') and s. 96 of the Courts of Judicature Act 1964, (hereafter 'the Act') the Federal Court has no jurisdiction to set aside its own judgment. Here, he has placed considerable reliance on the Supreme Court case of *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 drawing particular attention to the relevant passages in the judgment therein which state:

> The question before the Court is, therefore, whether sub-section (4) can be construed to confer unlimited power on the Supreme Court to review, meaning to re-open, re-examine and re-consider with a view to correction, variation, alteration or reversal, if necessary, an earlier decision in an appeal that has already been heard and disposed of.
>
> Our view is that there is no merit in the contention made by the applicants. Sub-section (4) of the Act cannot be construed to mean that it confers unlimited power upon the Supreme Court to re-open, re-hear or re-examine, if necessary, to reverse or set aside a judgment given in an appeal already heard and disposed of by it. So to construe would indeed not only be contrary to the clear meaning to the words used in section 69 but also contrary to Article 128(1) of the Federal Constitution. …
>
> With respect to appeals, section 41 of the Act provides that appeals shall be decided in accordance with the opinion of the majority of judges composing the Court. Read in the light of section 67(1), the jurisdiction of the Supreme Court in regard to civil appeals shall specifically be to hear an appeal from any judgment or order of any High Court. There is certainly no provision which confers jurisdiction on a Supreme Court to hear and determine appeals from a decision given in an appeal it has already heard and disposed of.
>
> Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under Section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

Reference has also been made to the Court of Appeal case of *Tai Choi Yu v. The Chief Registrar of the Federal Court* [1998] 2 CLJ 358 which has approved the propositions enunciated in *Lye Thai Sang*.

In rebuttal, counsel for the applicant takes the view that *Lye Thai Sang* was decided *per incuriam*. What is *per incuriam* had been aptly explained by Sir John Donaldson MR in *Duke v. Reliance Systems Ltd* [1987] 2 WLR 1225 when he said at p. 1228:

> I have always understood that the doctrine of *per incuriam* only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case, it has to be shown that, had the court had this material, it must have reached a contrary decision. That is *per incuriam*. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be position at which we have arrived to-day.

Counsel submits that the Federal Court in Malaysia can set aside its own judgments and orders in limited circumstances in the exercise of its inherent jurisdiction. It is his contention that the Federal Court, as the apex court in the country, has the inherent jurisdiction to prevent any abuse of its own process or any injustice. Here, he draws attention to art. 121(2) of the Constitution which stipulates:

> There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a Judge thereof;
>
> (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
>
> (c) such other jurisdiction as may be conferred by or under Federal Law.

In placing particular emphasis on cl. (c) above, counsel refers to the Civil Law Act 1956 as coming within the ambit of "Federal Law" stated therein. He draws particular attention to s. 3(1)(a) of the said Act under the heading *"Application Of UK Common Law, Rules of Equity and Certain Statutes."* Sub-section (1)(a) states:

> Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> (a) in West Malaysia or part thereof, apply the common law of England and the rules of equity as administered in England on the 7th day of April 1956 ...

> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

In this connection, counsel argues that in 1956, the common law of England clearly recognised the superior courts as having inherent jurisdiction to prevent injustice and/or abuse of its process. (See *Halsbury's Laws of England* – 4th edn, vol 37 para 14). According to him, the Supreme Court in *Lye Thai Sang* did not address itself to the import of the Civil Law Act 1956, in particular s. 3(1)(a) aforesaid.

Now, several cases were cited to demonstrate the limited circumstances in which the English courts had exercised their inherent jurisdiction where, for instance, the judgment had been obtained by fraud or suppression of material evidence. (See *Re Barrel Enterprises* [1972] 3 All ER 631; *Bright & Co v. Sellar* [1904] 1 KB 6; *Re Scott & Alvarez Contracts* [1895] 1 Ch 596; *Boswell & Coak (No 2)* Law Times Reports [1902] vol. LXXXXVI p. 365) (see also Malaysian cases: *Badiaddin v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75 and *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 144).

Inherent Jurisdiction

Let me say without more that whilst I agree with the applicant's counsel's contention that the Federal Court has inherent jurisdiction under the common law to review its previous decision, I am however unable to accept his stand that *Lye Thai Sang* was decided *per incuriam*. I agree entirely with the view expressed by the Supreme Court in *Lye Thai Sang* that s. 69(4) Courts of Judicature Act 1964 could not be construed to confer an unlimited power on the Supreme Court to review an earlier decision in an appeal which had already been heard and disposed of and therefore, in that context, the Supreme Court had no power to re-open, re-hear and re-examine its previous decision for whatever purpose. Quite clearly, that observation was made in the context of the proper construction to be placed on s. 69(4) of the Act. But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s. 3(1)(a) Civil Law Act 1956, read with art. 121(2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in *Lye Thai Sang*. In any event, the Federal Court has now been conferred with inherent power under r. 137 Federal Court Rules 1995. This has also been reiterated very recently by the Federal Court in the case of *Chia Yan Teck & Anor v. Ng Swee Keat & Anor* (Civil Appeal No. 02-03-98(B)) wherein Mohd Dzaiddin KHN said:

> Rule 137 of the Rules clearly gives us the inherent power to hear any application or make any order as may be necessary to prevent injustice.

For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to re-open, re-hear and re-examine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. In the circumstances, the preliminary objection raised by counsel for the respondent fails.

Whether Federal Court Properly Constituted

I now come to the first issue advanced by the applicant, ie, that the decision of the Federal Court dated 12 July 2000 was invalid as it was delivered by an improperly constituted court. Here, counsel for the applicant has contended that at the time of the delivery of the decision, one of the panel judges had retired and this had the effect of vitiating the validity of that decision. He cites in support the Indian case of *Surendra Singh v. State of Uttar Pradesh* [1954] 41 AIR (SC) 194, in particular the following passages therein which state:

> In our opinion, a judgment within the meaning of these sections is the final decision of the Court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court. It is a judicial act which must be performed in a judicial way …
>
> An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery as that is not the essence, except to say that it must be done in a judicial way in open court. But however it is done, it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the Court performs after the hearing. Everything up till then is done out of Court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have signed. The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the Court. That is what constitutes the judgment.
>
> Now up to the moment the judgment is delivered, judges have the right to change their mind. There is a sort of 'locus paenitentiae' and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallize into a full fledged judgment and become operative. It follows that the Judge who 'delivers' the judgment or causes it to be delivered by a brother Judge, must be in existence as a member of Court at the moment of delivery so that he can, if necessary, stop

> delivery and say that he has changed his mind. There is no need for him to be physically present in Court but he must be in existence as a member of the Court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views, it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery.
>
> But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision, nothing can be left to chance or doubt or conjecture; also a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometime a signed draft, to a brother Judge who also heard the case. This may be merely for his information or for his consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light drawn upon him before delivery of judgment.

In my view, these sentiments and observations expressed by the Indian Supreme Court have great persuasive force. Given those observations, what is the position in the case at hand? Here, it is not disputed that at the time of the delivery or pronouncement of the decision of the Federal Court on 12 July 2000, two of the three judges forming the panel were still in service. It may be noted here that the panel consisted of Eusoff Chin, KHN (the presiding judge); Wan Adnan Ismail, HBM and Chong Siew Fai, HBSS. The judgment was written by the presiding judge and the other two panel members agreed with it. However, at the time when the judgment was read out in open court by the senior assistant registrar, Chong Siew Fai, HBSS had retired. Only Eusoff Chin, KHN and Wan Adnan, HBM were still in service.

Section 78 Courts Of Judicature Act 1964

In this connection, counsel for the applicant has taken a two pronged approach. First he argues that s. 78 Courts of Judicature Act 1964, does not apply as it does not envisage a situation where a judge hearing the appeal is no longer a judge by reason of retirement or death or dismissal at the time when the decision is delivered or pronounced. Section 78 reads as follows:

> (1) If, in the course of any proceeding or in the case of a reserved judgment at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the

hearing of the proceeding shall continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

In this regard, counsel attempts to draw a comparison with s. 9 of the Act. In his written submission on p. 17, this is what he states:

> This provision (prior to amendment) was considered by the Tribunal which sat in judgment on Supreme Court Judges in 1988 and 1989 (Vol. III, Case 19). Their views are found at xcic and c of the Report. It was held that the words "Unable … owing to illness or absence from Malaysia or any other cause" referred primarily to causes such as bodily infirmity and other physical causes, but that a consideration of the Constitution revealed that vacancy must have been considered. The section has subsequently been amended. The conclusion must be that in the absence of specific words covering a vacancy, that contingency cannot be within the contemplation of section 78.

With respect, I do not see the rationality of this proposition. In any event, it does not help the applicant's case because counsel's use of the word "primarily" would seem to suggest that the ailments referred to, were not restricted entirely to bodily infirmity and other physical causes. In my view, the words in s. 78 are clear enough. The term "any other cause" must necessarily cover a situation where a judge has retired. To construe otherwise would create an absurdity. That could not have been the intention of Parliament. The first approach taken by the applicant holds no water.

The second approach canvassed by counsel for the applicant is in the alternative. This appears on p. 17 of his written submission which reads:

> Further even if section 78 applies to a vacancy in office, this does not relate to the Applicant's rights. Section 78 was amended in July 1998. Prior to the amendment, the consent of the parties was required if 2 judges were to act when the third was unable to act. The Applicant obtained leave to appeal on 17.7.95 and the appeal was heard on 12.1.1998 and 13.1.1998. The Applicant thus had a substantive right to have 3 judges on board until the judgment was delivered and should have been asked to consent to judgment being delivered when the third judge was unable to act.

This argument tends to suggest that s. 78 of the Act, which existed prior to its amendment on 1 August 1998 should apply given the factual circumstances involved and therefore consent of the applicant was required at the time judgment was delivered.

Now, the old s. 78 states:

> (1) If, in the course of any proceeding or in the case of a reserved judgment at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, though illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall, **if the parties consent,** continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.
>
> (2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.
>
> (3) **If the parties do not consent as aforesaid the appeal shall be re-heard**.

By virtue of the Courts of Judicature (Amendment) Act 1998 (Act 1031) s. 6 thereof, the words "if the parties consent" were deleted, as was the entire sub-s. (3) above. That being the case, the next relevant question to consider is whether the amendment has removed a substantive right or a procedural right. If it is a substantive right, then quite obviously, the amendment cannot have retrospective effect save by clear and express words. If it is procedural, then retrospectivity applies unless otherwise stated in the statute concerned. Counsel for the applicant has contended that it is a substantive right. I agree with him. Consequently, the amended s. 78 has no retrospective effect. In this case, I think it is important to note the actual words used in the old s. 78. Reading the provisions of that section as a whole, it does seem to me that the need for consent of the parties is confined to the continued hearing as opposed to the concluded hearing of a proceeding before the remaining panel of judges. This much is clear from the words used in the phrase "the hearing of the proceeding shall, if the parties consent, continue before … the remaining judges of the court, not being less than two …". Ordinarily, to "hear" a cause or matter means to hear and determine it unless there is something which, by natural intendment or otherwise, would cut down that meaning. However a contextual approach has to be adopted in this case. If the legislature had intended the ordinary meaning of the word "hearing" in the old s. 78(1) to prevail, it would not have been necessary to include the succeeding words "and judgment or reserved judgment, as the case may be, shall be given by …". The inclusion of such words in the manner expressed therein must clearly mean that the determination factor constituting the judgment or reserved judgment is not a matter for which consent of the parties need to be sought. Thus, on a proper construction, it must necessarily mean that where the actual

hearing of a case is still continuing at the time of the inability of any judge, either through illness or any other cause, consent of the parties is required before the said hearing can be continued or proceeded with. Where however the hearing of the case had already been concluded or completed pending judgment or reserved judgment at the time of the said inability, no consent is needed. Such a construction, even if its result be viewed as unjust or unpalatable, must prevail given the role of the courts as expressed in the *dictum* by Tun Suffian LP in *Public Prosecutor v. Sihabduin & Anor* [1981] CLJ 39; [1981] CLJ (Rep) 82 when he said:

> To paraphrase the words of Lord Diplock at page 54 in *Duport Steels Ltd v. Sivs* [1980] 1 All ER 529, the role of the judiciary is confined to ascertaining from the words that the law-maker has approved as expressing its intention what that intention was, and giving effect to it. Where the meaning of the words is plain and unambiguous, it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider the consequences of doing so would be inexpedient or even unjust or immoral; or to paraphrase the words of Lord Scarman at page 551 in the same case, in the field of statute law the judge must be obedient to the will of the law-maker as expressed in its enactments – the judge has power of choice where different constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result is unjust but inevitable he must not deny the statute: unpalatable statute law may not be disregarded or rejected simply because it is unpalatable; the judge's duty is to interpret and apply it.

It is in the light of the construction which I take that the factual matrix of this case has to be examined and considered. Here, there was an appeal before the Federal Court. It was heard by a panel of three judges. Hearing of the appeal concluded on 13th January 1998. Judgment was reserved. Thereafter, one of the panel members ie, Chong Siew Fai, HBSS retired from the judiciary. Shortly after, the reserved judgment was pronounced by the remaining panel members. From these facts, it is clear that the actual hearing of the appeal had concluded pending reserved judgment before the retirement of Chong Siew Fai, HBSS. As such, no consent of the parties needed to be sought. The situation would have been different if at the time of the retirement of Chong Siew Fai, HBSS, the hearing of the appeal had yet to be concluded. Consent of the parties would be required to continue the hearing of the appeal. Given the factual circumstances as disclosed herein, I hold that the applicant could not hope to take advantage of the substantive right of consent under the old s. 78. It did not arise in the present case.

Section 78 A Contingency Provision

In any event I take the view that s. 78 is essentially a contingency provision. It provides for a contingency to wit, inability of a judge, through illness or any other cause, to attend proceedings, or otherwise exercise his judicial functions. It comes into play only when the contingency occurs. This is reflected, *albeit* implicitly, from the two recent Federal Court cases of *Capital Insurance Bhd v. Aishah Abdul Manap & Anor* [2000] 4 CLJ 1 and *Chia Yan Teck (supra).*

In the instant case, the contingency occurred on 4 July 2000 when Chong Siew Fai, HBSS retired. At the time, the new s. 78 applied. The right to consent provided under the old s. 78 did not apply. It is not disputed that at the time when Chong Siew Fai, HBSS, retired, there were two other panel members still in office, ie, Eusoff Chin, KHN and Wan Adnan, HBM. That being so, the amended s. 78(1) is clearly applicable because it specifically provides that the reserved judgment shall be given by the remaining judges not being less than two. Here, the reserved judgment was delivered on 12 July 2000 when both of the remaining judges were still in office. I therefore find no merit in the second approach propagated by counsel for the applicant. For the reasons stated, I hold the view that the Federal Court was properly constituted at the time the reserved judgment was delivered. That judgment is therefore not vitiated.

The Issue Of Waiver

In the course of his submission, counsel for the respondent has raised the issue of waiver on the part of the applicant. This, I think, is a point worthy of consideration. This complaint is premised on the following factual circumstances: that the applicant, from the date judgment was reserved by the Federal Court on 13 January 1998 to the date of delivery of the said judgment on 12 July 2000, had taken 30 months to make the application to disqualify Eusoff Chin, KHN; that the application to disqualify was made some seven months after the judgment was delivered, making it a total of about 37 months of inactivity; that the applicant had admitted that the facts giving rise to an apprehension of bias on the part of Eusoff Chin, KHN arose during the course of hearing. The applicant offered two main reasons for the delay, namely,

a. that he did not have full knowledge of the facts or circumstances giving rise to grounds of apparent bias on the part of Eusoff Chin, KHN; and

b. that he did not have knowledge of his right to object or challenge the court's decision.

Counsel for the applicant submits, in effect, that there are justifiable grounds for the delay.

It is clear that all the information relating to Eusoff Chin, KHN which formed the basis of the applicant's complaint was available to him during the interim period between the date the judgment was reserved and the date of its pronouncement or delivery by the Federal Court. There was a lapse of about 30 months. The applicant did not rely on information coming to light after the judgment was delivered. In the circumstances, the applicant's allegation that he did not have full knowledge of the facts giving rise to the complaint cannot be true.

It is not disputed that the applicant had intended, at the onset of the appeal before the Federal Court, to challenge the qualification of Eusoff Chin, KHN on the basis of certain photographs but was advised against it by his counsel Encik Karpal Singh, apparently on grounds of insufficient merit. Given this development, it is certainly strange for the Applicant to subsequently allege that he did not have knowledge of the right to object or challenge on the matter of the disqualification of Eusoff Chin, KHN. In any event, at all material times, the applicant was defended by able counsel. Even if he did not personally know of his right to challenge, he would surely have been advised of such a right by counsel. In the circumstances, I find no truth in his allegation aforesaid.

It is also significant to note that the applicant took another seven to eight months to file the instant application to set aside the decision of the Federal Court. His explanation for the delay was that he was unable to get any solicitors to take up the matter given the repressive tendency apparent at the material time. He cited the repression to include the prevalence of contempt proceedings being made not only against certain parties but also their counsel involved. I find this explanation difficult to comprehend. In my view, even given the perception of repression the applicant might have had, I am still unable to accept such an irrational explanation. Without recounting names, I would say that there were at least half dozen lawyers in the country who would not have hesitated to take up the challenge.

In *Auckland Casino Ltd v. Casino Central Authority* [1995] 1 NZLR 142, the appellant continued as a participant at the hearing despite having knowledge of matters that pointed to bias on the part of the respondent. It was held that this had the effect of scuttling the appellant's attempt to raise bias as an issue for judicial review on the ground of waiver. I find the following passage in the judgment particularly instructive:

> A fair summation appears to us to be that, having spent some millions of dollars ... in costs of the application, the appellant decided to press on as a participant in the hearing, without raising the bias objections which were later made central to the third and fourth cause of action – thus deliberately taking

> the chance of the result before the Authority and reserving, as far as possible, any challenge on the ground of bias unless and until there was an adverse decision from the Authority. Factors influencing this election included fear of alienating the Authority and fear of public opinion. We accept that there was a real dilemma and confess to some sympathy with the appellant. The fact remains that the dilemma was resolved by inaction.

The English Court of Appeal in *Locabail (UK) Ltd v. Beyfield Properties Ltd & Other Appeals* [2000] 1 All ER 65 also dealt with waiver as one of several issues before it. Certain observations are particularly poignant to our case. They read:

> When, on day 8 of the hearing, the deputy judge made the disclosure recorded in the transcript, Mrs. Emmanuel could then have made an objection to the deputy judge continuing to hear the case. Or she could have asked for time to consider the position. She did neither but allowed the hearing to continue to a conclusion. She could, after the Hawks Hill hearing had come to an end, have objected to the deputy judge hearing the Hans House appeal. She did not do so, and, without objection, he heard the appeal. Thereafter, during a three-and-a-half month delay before the reserved judgment was delivered, no bias objection was made. An inference that might be drawn is that Mrs. Emmanuel wanted to await the results of the two hearings, and only made her bias objection when she knew she had lost. So the question arises whether she must be taken to have waived any bias objection.

Thereafter, the court came to the following conclusions:

> In our judgment, Mrs. Emmanuel and her lawyers had to decide … what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another judge. They could have told the judge they had no objection to him continuing with the hearing. In the event they did nothing. In doing nothing they were treating the disclosure as being of no importance. The hearing then continued for a further seven days, judgment was reserved, the Hans House appeal was heard, judgment was reserved and judgment in both cases was given three and a half months later. During all this period, Mrs. Emmanuel and her lawyers did nothing about the disclosure that had been made. … They only sprung into action and began complaining about bias after learning … that Mrs. Emmanuel had lost … It was not open to Mrs. Emmanuel to wait and see how her claims in the Locabail litigation turned out before pursuing her complaint of bias … [she] wanted to have the best of both worlds. The law will not allow her to do so.

In my view, the factual matrix in *Locabail* is not entirely dissimilar from our case. Here, the applicant had knowledge of all matters grounding his complaint of bias before judgment was delivered. He had ample time and opportunity to take the appropriate action. He did nothing. He waited until judgment was

delivered months later. Taking the cue from the Court of Appeal in *Locabail*, he only "sprung into action" and decided to complain about bias after he had lost the appeal. If he had not lost, it is quite certain that he would not have filed the motion. He wanted the best of both worlds. That, the law will not allow. The doctrine of waiver has militated firmly against him. It has acted as a bulwark against what can suitably be called an after-thought action. In my view, such conduct would have a contagious and adverse effect upon the veracity of the applicant's complaint of apparent bias against Eusoff Chin, KHN thereby rendering the second ground advanced by him to be of little value if any.

In the circumstances and for the reasons stated, I find it appropriate to dismiss the main motion with costs.

Siti Norma Yaakob FCJ:

There are three notices of motion filed by the parties before us.

(1) By the applicant dated 23 February 2001, to set aside an order of this court dated 12 July 2000 ('the principal application').

(2) By the respondent dated 30 March 2001, to set aside the principal application.

(3) By the applicant dated 4 April 2001, to amend three of his documents.

Application (2) above points in part to a number of irregularities appearing on the face of some of the applicant's documents in the principal application and this had prompted the applicant to file his application to amend the very same documents which the respondent claims to be irregular. Since the two applications are somewhat related at least in part, we had with the consent of all parties, heard the arguments on the motion to amend first. By this motion, which is procedural in nature, the applicant seeks to amend:

(1) his notice of change of solicitors dated 23 March 2001;

(2) his notice of motion dated 23 February 2001, relating to the principal application; and

(3) his affidavit in support of the principal application dated 22 February 2001.

It is the applicant's contention that the civil appeal number as stated in the intitulment of the first document as well as that stated in the other two documents has been wrongly numbered and that the stated Civil Appeal No. 02-6-95(W) be substituted by the correct Civil Appeal No. 02-5-95(W) in all three documents.

The applicant explained that there was some confusion in the numbering and that it arose in the following manner.

Together with six others, the applicant was sued by the respondent for defamation and conspiracy to defame in Kuala Lumpur High Court Civil No. S5-23-23-94. The allegations of defamation and conspiracy to defame relate to four articles that appeared in a monthly magazine. On 22 October 1994, the High Court found the applicant and his six co-defendants liable and separate awards were made against each of them for general and aggravated damages.

The applicant and another co-defendant, Ling Wah Press Sdn. Bhd., filed separate notices of appeal to the Court of Appeal, as did two other co-defendants who filed a joint notice, challenging the findings of liability and quantum. The Court of Appeal heard all three appeals together and on 18 April 1995, dismissed them.

The applicant and his three co-defendants took the matter further and they made separate applications for leave to appeal to this court and on 17 July 1995, such leave was granted.

It was pursuant to such leave that the applicant and Ling Wah Press Sdn. Bhd. who were represented by different solicitors, filed separate notices of appeal to this court and separate civil appeal numbers were given to the proceedings filed by them.

Civil Appeal No. 02-5-95(W) was allotted to the appeal filed by the applicant and Civil Appeal No. 02-6-95(W) to the appeal filed by Ling Wah Press Sdn. Bhd. Clearly the applicant's three documents sought to be amended state the wrong civil appeal number when they cited 02-6-95(W) and it is to correct this wrong that the application to amend was made.

Nonetheless there was strong objection to the amendments as the respondent maintained that the applicant had:

(1) delayed in the making of the application and no reason was given for such a delay;

(2) tampered and altered the figure "6" to read "5" in the notice of motion and affidavit in support and to that end the two documents had been falsified for which reports had been lodged with the police and the Anti-Corruption Agency;

(3) bad faith or there has been *mala fide* as the application to amend was only made after the respondent had filed his application to set aside the principal application.

From the affidavit evidence and the contemporaneous documents, there is no doubt that the applicant had cited the wrong civil appeal number in the three documents. Civil Appeal No. 02-6-95(W) relates to the appeal filed by Ling Wah Press Sdn. Bhd., the applicant's co-defendant in the defamation suit and which incidently was struck out by this court when the representatives of Ling Wah Press Sdn. Bhd. failed to appear.

Clearly what the application to amend seeks to do is to correct an erroneous civil appeal number appearing in the three documents. The proposed amendments go no further beyond that. As such the allegations of misconduct on the part of the applicant that he had delayed in seeking to amend, tampered and altered the civil suit number in his pleadings and possessed bad faith in making the application seem out of context and appear to be misplaced. This is more so when the proposed amendments seek no more than to correct a defect in the pleadings and provided that such amendments:

(1) do not change the character of the dispute into another and inconsistent character;

(2) are made *bona fide* on the part of the applicant; and

(3) cause no prejudice to the respondent which cannot be compensated in costs;

such amendments are normally always allowed in law. See the cases of *Looi Guan Kway v. Low Lean Bok & Others* [1938] 7 MLJ FMSR 35 and *Yamaha Motor Co. Ltd. v. Yamaha Malaysia Sdn. Bhd. & Ors.* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428.

Since the application to amend in these proceedings before us fulfills the three criteria as stated above, we had exercised our discretion and allowed the applicant's motion to amend but awarded the costs of the application to the respondent.

That left us with the remaining principal application by the applicant and the respondent's application to have it set aside on grounds other than those given for objecting to the application to amend. With the consent of the parties, we heard both applications together as they refer to the same subject matter.

Three issues were raised by the parties in support of their respective application.

1. Whether this court has any inherent jurisdiction to entertain the principal application to set aside its previous order dated 12 July 2000.

2. Whether the three member panel of this court that delivered its decision on 12 July 2000, had been properly constituted.

3. Whether the decision delivered on 12 July 2000, has been tainted by the apparent bias on the part of the presiding judge.

To appreciate the first issue I need to go back and trace the conduct of the proceedings of Kuala Lumpur Civil Suit No. S5-23-23-94 in so far as they relate to the applicant. As I have stated earlier, he was sued by the respondent for defamation and conspiracy to defame. On 22 October 1994, Mokhtar Sidin, J (as he then was) found the applicant liable and judgment for RM2 million was entered against him. He appealed to the Court of Appeal and on 18 April 1995, his appeal was dismissed with costs. On 17 July 1995, leave to appeal was granted by this court against the dismissal of his appeal by the Court of Appeal.

The three member panel of this court comprising of Eusoff Chin, CJFC; Wan Adnan, CJM; and Chong Siew Fai, CJSS; heard the applicant's appeal on 12 and 13 January 1998, and judgment was reserved. On 12 July 2000, the court delivered its judgment and dismissed the applicant's appeal with costs. The issue raised is whether this court has the inherent jurisdiction to set aside its own judgment pronounced on 12 July 2000.

On this jurisdictional issue, the respondent contends that we do not have the inherent power to set aside the impunged judgment as art. 128 of the Federal Constitution that sets out our original jurisdiction and s. 96 of the Courts of Judicature Act 1964, ('the Act') that governs our appellate jurisdiction limit our powers to what have been stated by the provisions contained in the two statutes and those provisions do not include the power to review an earlier decision in an appeal that has already been heard and disposed of. As authority, he relies heavily on the case of *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1986] 1 MLJ 166, where the then Supreme Court held that it "has no power to re-open, re-hear and re-examine its decision for whatever purpose."

In rebuttal, the applicant submits that *Lye Thai Sang* was decided *per incuriam* as the Supreme Court took a narrow and restrictive interpretation of particular sections of the Act pertaining to jurisdiction and failed to consider the provisions of s. 3(1)(a) of the Civil Law Act 1956, that imports English common law and equity as administered in England on 7 April 1956, into our judicial system and art. 121(2)(c) of the Federal Constitution that extends our jurisdiction to those that may be conferred by or under any other Federal Law. The contention of the applicant is that had the inherent jurisdiction of the English Courts as dictated by the common law of England been imported into the case and O. 92 r. 4 of the Rules of the High Court 1980, that provides for inherent jurisdiction, been considered, *Lye Thai Sang* would have been decided differently.

The crux of the issue on jurisdiction lies in whether this court has the inherent power to entertain the application to set aside the judgment dated 12 July 2000. This is quite unlike the situation in *Lye Thai Sang*, where the applicants in that case sought to review, ie, to re-open, re-hear and re-examine an earlier decision reached by the Supreme Court. It would appear that the application before the Supreme Court was more in the nature of an appeal against a decision it had already given in an appeal it had heard and disposed of. The same situation does not arise before us as what we are asked to determine is on the threshold question as to whether jurisdiction lies to entertain an application to set aside a previous judgment or order.

The jurisdiction to entertain an application like the applicant's has now been settled by a recent decision of this court in the case of *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61, where Mohamed Dzaiddin, CJFC, held that "Rule 137 of the Rules clearly gives us the inherent powers to hear an application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing our own decision in this instant case therefore does not arise."

Rule 137 of the Federal Court Rules 1995, referred to in that case contains the following provisions:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

That being so, it is now incumbent upon us to determine whether any injustice has been done to the applicant or whether an abuse of the process of court has been committed as to warrant the success or otherwise of the principal application. This is a question of law and must depend on the determination of either one of the remaining two issues raised by the parties, the first of which is whether the three member panel of this court that delivered its judgment on 12 July 2000, has been properly constituted.

It is common ground that when the judgment was delivered on 12 July 2000, it was pronounced in open court by the senior assistant registrar reading out a unanimous decision from a judgment written by Eusoff Chin, CJFC, the presiding judge. It is also not disputed that as at the date of the judgment, a member of the panel, Chong Siew Fai, CJSS, had retired from the bench nine days earlier on 3 July 2000.

The applicant contends that under such circumstances the court was unconstitutional and consequently its decision pronounced on 12 July 2000, is invalid.

In response, the respondent takes the stand that the validity of the judgment cannot be questioned for just before he retired, Chong Siew Fai, CJSS, had by letter dated 30 June 2000, indicated his approval to the judgment prepared by the presiding judge and such approval was also notified to the other member of the panel and as such he had made his decision known on 30 June 2000, before he retired.

He may well have done so but his decision is only known to his brother judges. Under such circumstances I consider that a more appropriate approach is to ascertain when the judgment becomes effective for it is at the effective date that one looks to consider the adequacy in the composition of the court. The effective date of a judgment has now been settled in the case of *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor (supra)* where in adopting the reasonings of the Indian Supreme Court in *Surendra Singh & Ors v. State of Uttar Pradesh* AIR [1954] SC 194, Mohamed Dzaiddin, CJFC, held that the effective date of any judgment is the date of its pronouncement in open court and not any other earlier acts aimed at arriving at a decision.

In this case there were only two judges remaining on 12 July 2000, who were capable of functioning as judges of that court, the third having been retired before that date. Under such circumstances both parties agree that if there is to be any saving, it can only be done under s. 78 of the Act. That is as far as their agreement goes for whilst the respondent relies on the current and amended s. 78 to say that the judgment is valid, the applicant takes the position that firstly s. 78 is not applicable and secondly whatever right that he had acquired under the original s. 78, cannot be taken away by the amendments and relying solely on his vested right as contained in the provisions of the original s. 78, the applicant maintains the judgment to be invalid as the court was not properly constituted.

Under s. 74(1) of the Act, every proceeding in the Federal Court shall be heard and disposed by a minimum of three judges. However s. 78 governs the situation where proceedings are continued in the absence of a judge and in substance, I reproduce the relevant portions of its provisions in so far as they relate to the facts of our case.

> (1) If ... in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the case is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court ... reserved judgment ... shall be given by the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceedings, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and if there is no majority the proceedings shall be re-heard.

The aforesaid provisions are the current provisions of s. 78 as amended by the Courts of Judicature (Amendment) Act 1998, which came into force on 1 August 1998.

The first objection taken by the applicant is that s. 78, as amended, is not applicable as it does not contain any provision regulating the situation where a judge can no longer function as one by reason of his retirement, death or dismissal.

I see no merit to this objection as the relevant provisions of s. 78 both in its original and amended forms, specifying the reasons for the absence of a judge are wide enough to include a judge who has retired, died or dismissed. This is clear from the words "any other cause" appearing in the phrase "unable through illness or **any other cause** to attend the hearing or otherwise exercise his function of a judge of the court." Those words admit to the interpretation that the other reasons why the absent judge cannot function as one may well be due to his retirement, death or dismissal.

Perhaps the applicant stands on firmer ground when he contends that whatever rights he had acquired under the original s. 78 cannot be taken away by the amendments.

Previous to 1 August 1998, there was the requirement that before delivery of a reserved judgment in the situation envisaged by s. 78, the court need to seek the consent of the parties before the judgment is pronounced and in the absence of such a consent, the appeal shall be re-heard. Since the principal and the respondent's applications were filed after the delivery of the reserved judgment that is after the amendments became effective, the applicant contends that the amendments cannot take away his vested right of being heard and his case determined by the three member panel but in the absence of one of them such right is to be determined by the law applicable at the date of the institution of his appeal and not by the law applicable at the date of the decision. The law applicable at the time his appeal was filed was that in the absence of one of the three judges who heard his appeal it becomes mandatory that the parties consent to the proceedings being continued with the remaining two judges, and since this was not done the judgment that was pronounced on 12 July 2000, was ineffective and invalid as the court was not properly constituted.

The respondent refutes such a contention on the ground that the requirement of consent that was taken away by the amendments was only procedural in nature and as such there is no question of the applicant having acquired any vested right under the unamended section.

Under these circumstances the pertinent question to ask is whether the amendments affected rights or procedure as it is now settled that unless there is a clear indication to the contrary such amendments are prospective if they affect substantial rights but retrospective if they affect procedure. See the Privy Council decision in the case of *Yew Bon Tew @ Yong Boon Tiew & Anor v. Kenderaan Bas Mara* [1983] 1 AC 553, also reported in [1983] 1 MLJ 1.

Whilst it is true to say that s. 78, both in its original and amended forms, regulates the procedure to be followed when a judge is absent, the pre-amendment requirement that the parties give their consent to the remaining two judges to proceed with the hearing and pronounce a judgment, is, I consider very much a substantive right. This is so as at the time of the commencement of the applicant's appeal, arguments were heard by a three member panel and there is that expectation that the same three member panel will arrive at a decision based on what was presented before it. However in the absence of one member of the panel, proceedings may still continue but subject to the parties consenting to the remaining two members of the panel bringing the hearing to a conclusion and any decision reached must be a majority one. Under these circumstances the parties are vested with the right to control the proceedings of a hearing for without their consent, the applicant's appeal has to be ventilated afresh before another panel. I hold that the applicant's entitlement to control the proceedings constitutes an interest that accrued at the commencement of his appeal and which I say is protected by s. 30(1)(b) of the Interpretation Acts 1948 and 1967, which states that the repeal of a written law in whole or in part shall not affect any right, accrued or incurred under the repealed law. Hence the issue here is not so much on the composition of the panel hearing the appeal but more so on the deprivation of a substantive right that had accrued to the applicant.

Since the applicant's accrued interest has been violated in this case leading to a miscarriage of justice, it follows that he is entitled to have his appeal re-heard before another panel of this court.

On the issue of bias I concur with the reasons given by my brother, the learned Chief Judge that bias merits no consideration in these applications before us.

Since a division of this court that delivered the judgment on 12 July 2000, had not accorded the applicant his substantive right to consent to the judgment being delivered by the remaining two members of the panel – a right that

was not taken away by the amendment to s. 78 of the Act, it follows that the reserved judgment was delivered in breach of the applicant's substantive right and to that end the reserved judgment is hereby set aside. On that finding the principal application is allowed whilst the respondent's application is dismissed. Although there are two applications before us, there will be one set of costs as both applications relate to the same dispute and such costs will be paid by the respondent to the applicant in any event. Finally the deposit made by the applicant is to be refunded to him whilst that of the respondent be paid out to the applicant to account of his taxed costs.

Haidar Mohd Noor FCJ:

There are three applications by way of motions filed by the parties before us. They are:

(1) By the applicant dated 23 February 2001, to set aside the order of this court dated 12 July 2000.

(2) By the respondent dated 20 March 2001 to set aside the application by the applicant dated 23 February 2001.

(3) By the applicant dated 4 April 2001 to amend three of his documents.

By consent of the parties, we heard the application dated 4 April 2001 to amend first. There was strong objection to the application by the respondent. After hearing the parties we allowed the application but ordered the costs to the respondent in any event. The reasons are sufficiently set out by Siti Norma Yaakob, FCJ, in her judgment and I have nothing further to add.

That left us with the application of the applicant dated 23 February 2001 and the application of the respondent dated 20 March 2001 (other than those given for objecting to the application to amend). We heard the two applications together as agreed by the parties.

The applicant relied essentially on two grounds:

(1) that the judgment was invalid as it was delivered by an improperly constituted court; and

(2) that the judgment was tainted by an apparent bias on the part of the presiding judge.

The respondent raised a jurisdictional point, that is, whether this court can re-open, re-hear and re-examine its own order dated 12 July 2000 and set it aside.

For the reasons stated by the learned Chief Judge, I agree there are no merits in respect of ground (2). That leaves ground (1) as well as the jurisdictional issue for consideration. I will consider both issues together.

On the facts, the central issue for consideration is the effect of the amendment to s. 78 of the Courts of Judicature Act 1964 ('CJA') by the Courts of Judicature (Amendment) Act 1998, (Act A1013) which came into force on 1 August 1998, that is, whether the said amendment is retrospective. I say so because the reserved judgment was delivered after the amendment and the constitutionality of the court is really not an issue as there were still two remaining judges of the court when the reserved judgment was delivered. I will touch on this issue later in the judgment.

The relevant question is whether the amendment takes the form of a substantive right or a procedural right. In other words, has the amendment removed the substantive right or the procedural right of the applicant?

The facts can be shortly stated as follows.

The applicant's appeal was heard by a three-member panel comprising of Eusoff Chin, KHN, Wan Adnan, HBM, and Chong Siew Fai, HBSS, on 12 and 13 January 1998 and judgment was reserved. The court delivered a written judgment on 12 July 2000 read by the senior assistant registrar. There was only one judgment of the court and it was written by Eusoff Chin, KHN, the presiding judge. The judgment was an unanimous one. However, at the time of the delivery of the judgment, Chong Siew Fai, HBSS, a member of the panel, had retired from the bench nine days earlier on 3 July 2000. It is not disputed that before his retirement Chong Siew Fai, HBSS, had by letter dated 30 June 2000 indicated his approval to the written judgment of the presiding judge and such approval was also notified to the other member of the panel, Wan Adnan, HBM, who also signified his approval.

What need to be considered first is when is the effective date of a judgment. This court in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 had the occasion to consider the effective date of a judgment, that is, is it the date of giving the judgment or the pronouncement of the judgment in open court? In holding that the effective date of the judgment in the said case is the date of pronouncement in open court, and not the date when it was signed by the remaining two judges of the court, Mohamed Dzaiddin, CJ (Malaysia), said at pp. 70 and 71:

> The primary question for decision is the effective date of the judgment. Is it the date of giving the judgment or the pronouncement of the judgment in open court?
>
> In my opinion, there is a clear distinction between the giving of judgment under s. 78 of the Act and the pronouncement of the said judgment in r. 63 of the Rules. Section 78 of the Act provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two,

and in which case, the court shall be deemed to be duly constituted. This begs the question: when is the judgment of the remaining judges given? The section does not provide the manner in which the time from when the judgment is to take effect. Rule 63 of the Rules seems to provide the answer. Clearly, r. 63 of the Rules provides the mode how a judgment is to be delivered, which is, by pronouncement in open court, and under para (2) of r. 63 of the Rules, it may be read by a judge of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W'Field Fr Co v. Steel Construction Co* at p. 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice. See *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319.

In addition to the above, I also adopt the reasonings in *Surendra Singh* which the Singapore Court of Criminal Appeal, in *Ramachandran*, agreed with its analysis in relation to Singapore criminal cases.

In *Surendra Singh*, the Supreme Court of India observed (at p. 195):

> Delivery of judgment is a solemn act which carries with it serious consequences for the person or persons involved ... For that reason rules have been drawn up to determine the manner in which and the time from when the decision is to take effect and crystallize into an act which is thereafter final so far as the court delivering the judgment is concerned.

Further, at p. 196, the court held as follows:

> In our opinion, a judgment within the meaning of these sections is the final decision of the court intimated to the parties and to the world at large by formal 'pronouncement' or 'delivery' in open court. It is a judicial act which must be performed in a judicial way. Small irregularities in the manner of pronouncement or the mode of delivery do not matter but the substance of the thing must be there: that can neither be blurred nor left to inference and conjecture nor can it be vague. All the rest – the manner in which it is to be recorded, the way in which it is to be authenticated, the signing and the sealing, all the rules designed to secure certainty about its content and matter – can be cured; but not the hard core, namely the formal intimation of the decision and its contents formally declared in a judicial way in open court. The exact way in which this is done does not matter. In some courts, the judgment is delivered orally or read out, in some only the operative notice to the parties and laying the draft on the table for a given number of days for inspection.

> An important point therefore arises. It is evident that the decision which is so pronounced or intimated must be a declaration of the mind of the court as it is at the time of pronouncement. We lay no stress on the mode or manner of delivery, as that is not the essence, except to say that it must be done in a judicial way in open court. But however it is done it must be an expression of the mind of the court at the time of delivery. We say this because that is the first judicial act touching the judgment which the court performs after the hearing. Everything else up till then is done out of court and is not intended to be the operative act which sets all the consequences which follow on the judgment in motion. Judges may, and often do, discuss the matter among themselves and reach a tentative conclusion. That is not their judgment. They may write and exchange drafts. Those are not the judgments either, however heavily and often they may have been signed. *The final operative act is that which is formally declared in open court with the intention of making it the operative decision of the court. That is what constitutes the 'judgment'.* (emphasis added.)

The situation in *Chia Yan Tek*'s case is slightly different from this case as there at the time of the pronouncement of the judgment there was only one judge remaining on the coram, that is, Wan Adnan, HBM, whereas in this case there were still two judges remaining on the coram, that is, Eusoff Chin, KHN, and Wan Adnan, HBM. It would appear therefore that if the remaining judges formed the majority of the opinion and I think so in this case, then the court shall for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of Chong Siew Fai, HBSS. This is provided by the amended s. 78 of CJA which came into force on 1 August 1998.

It is to be noted, however, that at the time the appeal was filed by the applicant and when it was heard and judgment was reserved, the amendment to s. 78 of CJA had not been made yet. It is then necessary to examine the original s. 78 and the amended s. 78 of CJA. The original s. 78 reads:

> **78 Continuation of proceedings notwithstanding absence of Judge**
>
> (1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall, **if the parties consent,** continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

(3) **If the parties do not consent as aforesaid the appeal shall be re-heard.** (emphasis is mine)

The amended s. 78 reads:

78 Continuation of proceedings notwithstanding absence of Judge

(1) If, in the course of any proceeding, or, in the case of a reserved judgment, at any time before delivery of the judgment, any Judge of the Court hearing the proceeding is unable, through illness or any other cause, to attend the proceeding or otherwise exercise his functions as a Judge of that Court, the hearing of the proceeding shall, continue before, and judgment or reserved judgment, as the case may be, shall be given by, the remaining Judges of the Court, not being less than two, and the Court shall, for the purposes of the proceeding, be deemed to be duly constituted notwithstanding the absence or inability to act of the Judge as aforesaid.

(2) In any such case as is mentioned in subsection (1) the proceeding shall be determined in accordance with the opinion of the majority of the remaining Judges of the Court, and, if there is no majority the proceeding shall be re-heard.

It seems clear to me that under the original provision of s. 78 of CJA, given the situation in this case, the consent of the parties is required as Chong Siew Fai, HBSS, had retired by the time the reserved judgment was pronounced on 12 July 2000 the effective date of the judgment. I agree with the view of the learned Chief Judge that the words "any other cause" in s. 78 are clear enough to cover a situation where a judge has retired as in this case. My learned sister, Siti Norma Yaakob, FCJ, shared the same view. As stated earlier, following *Chia Yan Tek*, the effective date of the judgment is 12 July 2000 and approval of the judgment by Chong Siew Fai, HBSS, is of no consequence in view of his retirement at the material date. I can accept that the reserved judgment was unanimously given by the remaining judges, but the key issue is whether the consent of the parties has been removed by the amendment. As stated earlier, is the amendment retrospective?

It was the contention of counsel for the applicant by way of an alternative argument that the amendment is not retrospective and hence the applicant could very well exercise his right to withhold the consent if such consent was asked of him before delivery of the reserved judgment. In that event the appeal, by virtue of the original s. 78 of CJA, shall be re-heard. That is the order that the applicant is asking from this court in his application before us.

The applicant is not asking this court to review the judgment of the court given earlier on or as seemed to be the contention of the respondent's counsel when he relied on *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn. Bhd. & Ors.* [1985] 2 CLJ 423; ([1985] CLJ (Rep) 196) in raising the jurisdictional point before us. The Supreme Court in *Lye Thai Sang* accepted that there are two exceptions where there can be a re-hearing when it stated at p. 427 (p. 198) thus:

> Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular sub-section (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

Sections 42 and 44 of CJA (now applicable to Court of Appeal) are in *pari materia* with ss. 78 and 80 of CJA in respect of the powers of this court.

The learned Chief Judge accepted that the consent of the parties prescribed under the original s. 78 of CJA is a substantive right. I agree. Given that situation, in my view, the approach should be whether the amendment to s. 78 of CJA taking away the consent of the parties is retrospective and if it is so then the application fails and if it is otherwise the applicant would be entitled to succeed.

In construing whether the amendment to s. 78 of CJA is retrospective, the relevant legislation for consideration is s. 30(1)(b) of the Interpretation Acts 1948 and 1967 (Act 388) which reads:

> (1) The repeal of a written law in whole or in a part shall not:
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or

As I am of the view that the consent of the parties is a substantive right, it follows that any law removing that right will not be retrospective unless the contrary is expressed therein. The Privy Council in the case of *Yew Bon Tew & Anor v. Kenderaan Bas Mara* [1983] 1 CLJ 11; ([1983] CLJ (Rep) 56) in dealing with the amendment to our Public Authorities Ordinance 1948 in which a limitation period of action of 36 months was substituted for the previous period of 12 months quoted with approval at p. 12 (p. 59), the judgment of A.L. Smith, LJ, in "*The Ydun*" (1899) p. 236 (at p. 245):

> The rule applicable to cases of this sort is well stated by Baron Wilde in *Wright v. Hale* [1860] 6 H & N 227, 232, namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But when the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.

The Privy Council went on to state whether a statute is to be construed in a retrospective sense, and if so, to what extent, depends on the intention of the legislature as expressed in the wordings of the statute, having regard to the normal construction and to the relevant provisions of any interpretation statute. In the Courts of Judicature (Amendment) Act 1998 the legislature did not expressly state that the amendment is retrospective or even by necessary intendment. It is my view therefore that the amendment removing the consent of the parties is not retrospective as it affects the substantive right of the applicant and it is not a matter of procedure.

Another case that may be of assistance in considering the substantive right that was pending before it is taken away by an amendment is the Privy Council case of the *Colonial Sugar Refining Company Limited v. Irving* [1905] AC 369. This case relates to the power of the Collector of Customs in Queensland under the Excise Tariff 1902, requiring the Colonial Sugar Refining Company Limited to pay 20,100*l* excise duty in respect of 6700 tons of sugar. They deposited the money with the collector in accordance with the Excise Act 1901, and then brought an action against the collector to recover the sum deposited. The writ in the action was issued on 25 October 1902. Under the Rules of the Supreme Court a special case was stated by the parties for the opinion of the Full Court. The case was set down for argument in July 1903, but it stood over until the September sittings of the court. On 4 September 1903, the court decided that the Government was entitled to retain the duty and gave judgment for the collector with costs. In the meantime the Judiciary Act 1903, had been passed. It received the Royal Assent on 25 August 1903.

The Colonial Sugar Refining Company Limited, the appellants, being dissatisfied with the judgment of the Supreme Court of 4 September 1903, applied to the court for leave to appeal to His Majesty in council. The application was heard by Cooper CJ, and Real J. The learned judges differed in opinion. The Chief Justice thought that leave ought to be granted but Real J was of the contrary opinion. In accordance with the order in council of 30 June 1860, the opinion of the Chief Justice prevailed, and leave to appeal was accordingly granted.

The collector, who is respondent to an appeal presented by leave of the Supreme Court of Queensland, filed a petition asking that the appeal may be dismissed with costs on the ground that the right of appeal to His Majesty in Council given by the order in council of 30 June 1860, under which leave was granted, has been taken away by the Judiciary Act 1903, and that the only appeal from a decision of the Supreme Court of Queensland now lies to the High Court of Australia.

It was contended on behalf of the appellants before the board that the provisions of the Judiciary Act 1903, on which the respondent (collector) relies, assuming them to be within the powers of the Commonwealth Legislature, are not retrospective so as to defeat a right in existence at the time when the Judiciary Act 1903 received the Royal Assent.

The board dismissed the petition with costs. Lord Macnaghten, writing for the board, stated at p. 372:

> As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

As the amendment to s. 78 of CJA by the Courts of Judicature (Amendment) Act 1998 affects the substantive right of the applicant and the amended Act does not expressly or by necessary intendment make it retrospective, the consent of the applicant to the reserved judgment by the remaining judges has not been taken away. In my view, the failure to get the consent of the applicant in this case has occasioned an injustice to the applicant. The remaining judges should have obtained the consent of the applicant before delivering the reserved judgment even though it can be considered as a majority judgment and it was a properly constituted court.

In my view, as the consent of the parties was not obtained before the reserved judgment was given and it being a substantive right of one of the parties, that is, the applicant, it follows that the judgment of the court was invalid and under the original s. 78(1) read with s. 78(3) of CJA, the proper order would be for the appeal to be re-heard before another panel.

In addition thereto, if any injustice is caused to a party as in this case, this court can resort to its inherent powers under r. 137 of the Rules of the Federal Court 1995.

This court had the occasion to consider r. 137 *vis-a-vis* s. 78 in *Chia Yan Tek v. Ng Swee Kiat, supra*, where Mohamed Dzaiddin, Chief Justice, stated at p. 72:

> Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing the court's own decision in the instant case therefore did not arise.

In the circumstances I would allow the application of the applicant as his consent, being a substantive right, was not obtained before delivery of the reserved judgment by the remaining judges. In the result, the order dated 12 July 2000 is hereby set aside and the appeal shall be re-heard by a newly constituted panel of the Federal Court. It follows that the respondent's application must be dismissed and I do so order.

I agree with the order of costs made by Siti Norma Yaakob, FCJ, in allowing the applicant's application and dismissing the respondent's application as well as the order in respect of the deposit by the applicant and the respondent.